

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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FRANCISCO BARAJAS,

Plaintiff,

v.

WELLS FARGO BANK, N.A.; et al.,

Defendants.

3:11-cv-0894-LRH-VPC

ORDER

Before the court are defendants Wells Fargo Bank, N.A. (“Wells Fargo”); Mortgage Electronic Registration Systems, Inc. (“MERS”); and America’s Servicing Company, Inc.’s (“America’s Servicing”) motion to dismiss (Doc. #5<sup>1</sup>) and motion to confirm expiration of the underlying temporary restraining order (Doc. #8). Plaintiff Francisco Barajas (“Barajas”) filed an opposition (Doc. #11) to which moving defendants replied (Doc. #12).

Also before the court are defendant National Default Servicing Corporation’s (“NDSC”) motion to dismiss (Doc. #14); and defendant T.D. Service Company’s (“T.D”) motion to dismiss (Doc. #16).

**I. Facts and Procedural History**

In August, 2005, Barajas purchased real property through a mortgage note and deed of trust

<sup>1</sup> Refers to the court’s docket number.

1 originated by defendant BNC Mortgage, Inc. (“BNC”). Eventually, Barajas defaulted on the  
2 mortgage note and defendants initiated non-judicial foreclosure proceedings.

3 Subsequently, Barajas filed a complaint in state court against defendants alleging three  
4 causes of action: (1) wrongful foreclosure; (2) declaratory relief; and (3) injunctive relief. Doc. #1,  
5 Exhibit A. Defendants removed the action to federal court based upon diversity jurisdiction.  
6 Doc. #1. Thereafter, moving defendants filed the present motions to dismiss. Doc. ##5, 14, 16.

## 7 **II. Legal Standard**

8 Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure  
9 to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state  
10 a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading  
11 standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That  
12 is, a complaint must contain “a short and plain statement of the claim showing that the pleader is  
13 entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require  
14 detailed factual allegations; however, a pleading that offers “‘labels and conclusions’ or ‘a  
15 formulaic recitation of the elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 129 S.  
16 Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

17 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,  
18 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting  
19 *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows  
20 the court to draw the reasonable inference, based on the court’s judicial experience and common  
21 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility  
22 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a  
23 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a  
24 defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to  
25 relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

1 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as  
2 true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of  
3 the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret*  
4 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)  
5 (internal quotation marks omitted). The court discounts these allegations because “they do nothing  
6 more than state a legal conclusion—even if that conclusion is cast in the form of a factual  
7 allegation.” *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint to survive a motion to  
8 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be  
9 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*

### 10 **III. Discussion**

#### 11 **A. Wrongful Foreclosure**

12 An action for wrongful foreclosure requires that, at the time of the foreclosure sale, the  
13 plaintiff was not in breach of the mortgage contract. *Collins v. Union Federal Sav. & Loan Ass’n*,  
14 662 P.2d 610, 623 (Nev. 1983). Here, it is undisputed that Barajas was in default on his mortgage  
15 obligations so there can be no sustainable action for wrongful foreclosure.

16 Further, Barajas’s claim that defendants violated the recent amendments to Nevada’s  
17 recording statute, AB284, which requires all assignments of the deed of trust to be recorded, is  
18 without merit. The amendment only applies to assignments and foreclosures occurring on or after  
19 October 1, 2011. Here, it is undisputed that the underlying foreclosure, along with the filing of the  
20 notice of default and all assignments, commenced in 2008. *See* Doc. #1, Exhibit A. Thus, AB284  
21 does not apply to the underlying foreclosure and cannot constitute a claim for relief in this action.  
22 Accordingly, the court shall grant moving defendants’ motions to dismiss.

#### 23 **B. Declaratory and Injunctive Relief**

24 Claims for declaratory and injunctive relief are remedies that may be afforded to a party  
25 after he has sufficiently established and proven his claims; they are not separate causes of action.  
26

1 *See e.g., In re Wal-Mart & Hour Employment Practices Litig.*, 490 F. Supp. 1091, 1130 (D. Nev.  
2 2007). Here, Barajas fails to allege any claims against defendants that warrant relief. Thus, he is not  
3 entitled to declaratory or injunctive relief. Accordingly, the court shall grant moving defendants'  
4 motions to dismiss.

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6 IT IS THEREFORE ORDERED that defendants' motions to dismiss (Doc. ##5, 14, 16) are  
7 GRANTED. Plaintiff's complaint (Doc. #1, Exhibit A) is DISMISSED in its entirety.

8 IT IS FURTHER ORDERED that defendants' motion to confirm expiration of the  
9 temporary restraining order (Doc. #8) is GRANTED.

10 IT IS SO ORDERED.

11 DATED this 28th day of March, 2012.



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14 LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE  
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